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Nos. 938 and 939

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

PEABODY COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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No. 939

UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS

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NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Company Pet. App. 1–14, Union Pet. 1a–12a) is reported at 284 F. 2d 910. The decision and order of the National Labor Relations Board (R. 54–67) [1] are reported at 125 NLRB 1256.

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[1] "R." refers to the joint appendix filed in the court of appeals.

JURISDICTION

The opinion and order of the court of appeals was issued on December 2, 1960, and the Board's petition for rehearing was denied on January 17, 1961 (Company Pet. App. 1, 15, 16; Union Pet. 1a, 12a, 13a). On February 27, 1961, Mr. Justice Clark extended the time for filing a petition for certiorari to May 1, 1961. The decree of the court of appeals was entered on April 5, 1961 (Company Pet. App. 17–25, Union Pet. 13a–20a). The petitions for writs of certiorari were both filed on May 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's conclusion that the employer gave assistance and support to the United Mine Workers and engaged in other conduct for the purpose of encouraging its employees to switch their allegiance from Progressive Mine Workers to United, and that United aided this illegal program by independently restraining and coercing the employees to select United as their representative.

2. The petition in No. 938 presents the further question whether, in the circumstances of this case, the provisions of the Board's cease and desist order are too broad.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the petitions (Company Pet. App. 26–30; Union Pet. 21a–23a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In May 1956, the Peabody Coal Company, herein called the Company, acquired control of the Millstadt and O'Fallon mines in Illinois (R. 8–9; 199–200, 649).[2] For about 20 years, the Progressive Mine Workers, herein called Progressive, had been the exclusive bargaining representative of the employees at these mines (R. 9; 203–204, 231), and a party to collective bargaining agreements with the Coal Producers Association of Illinois, through which the Company and its predecessors had bargained. The expiration date of Progressive's current contract with the Company was September 30, 1957 (R. 9). All employees at the mines were members of Progressive at least until June 10, 1957 (R. 722).

The Company, as a member of the Illinois Coal Operators Association, has for many years recognized the United Mine Workers of America, herein called UMW, as exclusive bargaining representative at its 27 other mines (R. 9; 276–277, 446, 555), and has been a party to a collective bargaining agreement with UMW which includes the National Bituminous Coal Wage Agreement of 1950, as amended (R. 9, 18–19, 55; 699–717). The National Bituminous Agreement purports to cover "all of the bituminous coal mines owned or operated" by the signatory em-

[2] The mines were originally acquired through a subsidiary, but Peabody acquired direct ownership as a result of liquidation and merger proceedings completed by October 1957 (R. 7–9) and is now the only corporation involved.

ployers as well as the "operation of all coal lands * * * acquired during" the term of the agreement (R. 9–10; 700).

In May or June of 1957, Hugh White, President of UMW's District 12, notified William V. Hartman and H. C. McCollum, the Company's general mine superintendent and vice president, respectively, that the Company "must comply with the provisions in the [National Bituminous Agreement]" by recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines (R. 10; 227–279, 685, 281–283, 377, 404, 417–418, 441–442, 462). His demand was based upon the provisions of the National Bituminous Agreement noted above (R. 700) and not upon a claim that UMW represented any of the employees at these mines (R. 10; 278, 282–283, 417–418, 442). McCollu and Hartman agreed that the contract "did apply to the Company's operations" and that they would apply it as a matter of course when their contract with Progressive expired, and when UMW could show a majority (R. 10–11; 284–286).

At about the same time, White asked Hartman for a list of the names and addresses of the employees of the Millstadt mine. Hartman, assuming that White wanted the list for an organizing campaign at the mine, complied with the request (R. 13; 404–405). McCollum, with actual knowledge that that was the purpose for which the information would be used, furnished White with a similar list for the O'Fa' n mine (R. 13; 459–460).

On July 1, 1957, the UMW sent letters to all employees at both mines.[3] The letters noted the Company's recent purchase of the mines, and stated that the National Bituminous Agreement applied to or covered all of the mines owned or operated by signatories to the Agreement and that, "Recently the United Mine Workers of America has served notice on the Peabody Coal Company that they must comply with the provisions in the contract, and all provisions of the contra[illegible] be applied at the [Millstadt and O'Fallon mines]." The letter requested that "each and every employee subject to the jurisdiction of the contract" become a UMW member, and noted that no initiation fee would be charged (R. 15–16; 685–687, 693–695).

On July 4, 1957, Ray Dupee, president of Progressive's District No. 1, wrote the Company, after learning of UMW's demand, and cautioned the Company to comply with the Progressive agreement and the wishes of "your employees as to union affiliation" (R. 27–28; 228, 683–684). The Company did not reply to Dupee's letter (R. 28; 228). Dupee made numerous attempts to contact the Company in an effort to ascertain the Company's position on the UMW demand, but was consistently told that the parties with whom he wished to speak were "not available" (R. 28; 229).

The annual vacation for employees at the Millstadt and O'Fallon mines, during which the mines were to

[3] The letters were reprinted in a local newspaper on July 3, 1957 (R. 19, fn. 6; 697).

be closed, was scheduled for the period June 28 to July 8, 1957 (R. 19; 226–227, 298, 314, 349, 392). Because of repair work being done, the scheduled reopening of the Millstadt mine was later postponed until July 15 (R. 20; 298, 314, 382). The repair work was completed on July 12, but the Company did not open the mine until July 20 (R. 20; 298–301, 309, 315, 334–335, 382–383, 395, 425). Mine superintendent Schroeder informed a repair crewman that the mine would not open because the Company had a standing agreement with UMW not to operate a mine unless it was UMW, and that the Company could not operate two mines and have its other 27 mines shut down (R. 20; 299–300, 305–306, 308, 316, 428). Schroeder stated that "it looks like there will be no work unless we go United" (R. 300, 308). When Frank Krietner, president of Progressive's local at the Millstadt mine, asked whether the mine would remain closed unless the employees joined UMW, General Superintendent Hartman declined comment and then read Kreitner a letter from the UMW, dated July 10, which demanded full compliance with the National Bituminous Agreement (R. 20–21; 319–334). When Hartman finished reading the letter, he commented: "That's it, boys, United is forcing us to comply" (R. 21; 322, 327, 334).[1] When the mine was reopened on July 20, Foreman Pruessing asked why the plant had started up, and Hart-

[1] During the week of July 15, Schroeder told another employee that the mine would not reopen "until the union or the company had got things settled" (R. 22; 339–340).

man replied that he believed "that United got enough cards among the men" (R. 23, fn. 9; 720).

The O'Fallon mine was scheduled to reopen July 9. The Company informed Progressive, however, that the mine would not reopen until further notice (R. 24; 349–350). Despite Progressive's repeated inquiries, the Company refused to give any reason for the shutdown (R. 24; 350–351). Finally, Progressive was able to arrange a meeting with Company Vice-President McCollum on July 17, at which time McCollum apologized because the Company had not notified them sooner that the "State Mining Inspector at Large had closed the mine down" because of "bad air" (R. 24–25; 351–352). Stanley Feist, president of Progressive's local at the O'Fallon mine, who was aware that the mine had never been shut down in the past for that reason and that no official notices had been posted around the mine as required by law, asked McCollum if the real reason for the mine's shutdown was the UMW's demand (R. 24–25; 351–353, 371). McCollum responded by handing Feist a copy of the UMW's July 10 letter which demanded that the Company comply with the terms of the UMW contract by giving effect to it at all of the Company's mines. McCollum then stated that "the Peabody Coal Company had 29 mines and it wouldn't run two under Progressive and have the 27 under United shut down (R. 25; 353–354, 368–382, 717).[5]

[5] McCollum added that the Company had no alternative in the matter, and that after the Progressive contract expired on September 30, "There would not be another contract signed by Peabody with Progressive" (R. 25; 354–355, 368, 372, 452).

The Company finally opened the O'Fallon mine on July 22 (R. 25; 355, 452).

On July 13 and 19, the Company notified the Coal Producers' Association, through which the Company was under contract with Progressive, that the Company was withdrawing from membership in the Association effective September 30, 1957 (R. 29–30; 213–214, 215–216, 407–408, 679–680). The letter also revoked the Association's authority to represent the Company in bargaining with Progressive. Also on July 19, the Company advised Progressive of its withdrawal from the Association, and notified Progressive that the current contract would be treated as terminated on September 30, 1957 (R. 30–31; 214–215, 681–683).

On August 4, Progressive protested the contemplated termination of the agreement, challenged the right of the Company and UMW to apply the UMW contract to the employees at the mines, and requested that the Company meet with Progressive as the employees' bargaining representative to negotiate a new agreement.[6] The Company never responded to this request to bargain (R. 32–33; 232–234, 688–690). On September 30, the Company terminated its contract with Progressive and ceased making the payments to Progressive's Welfare and Retirement Fund which were required by the contract (R. 33–35; 234, 620,

[6] The Trial Examiner, whose findings were adopted by the Board, found that at that time Progressive represented a majority of all of the employees at both mines and that none of the employees had revoked membership in Progressive or selection of it as their bargaining agent (R. 36).

626-627, 660). On about October 1, 1957, the Company recognized UMW and applied the UMW contract at the Millstadt and O'Fallon mines (R. 33-34; 289-290). Since October 1, the Company has been checking off membership dues, fees and assessments from wages of the employees at the two mines, and remitting them to the UMW (R. 18-19, 40; 290, 613, 614).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company assisted and supported the UMW in violation of Section 8(a)(2) and (1) of the Act. The illegal conduct consisted of: (1) furnishing UMW with an employee mailing list,[7] discriminatorily locking out employees at the mines, refusing to bargain with Progressive, terminating the contract with Progressive, and discontinuing payments to Progressive's Welfare and Retirement Fund—all to encourage membership in UMW; (2) entering into an exclusive bargaining contract with UMW at a time when UMW did not represent an uncoerced majority of the employees, and when that contract contained illegal closed-shop provisions.[8] The Board also found that certain of this conduct constituted discrimination in

[7] The Board did not hold that furnishing the mailing list was *per se* unlawful, but only in the context of the Company's numerous other acts of assistance (R. 54).

[8] The National Bituminous agreement contained a provision requiring that "As a condition of employment employees shall be, or become, members of the [UMW] to the extent and in the manner permitted by law." The Board concluded that the qualifying clause was not sufficient to dissipate the effect of the illegal condition set forth at the outset, and thus that the contract imposed a closed-shop requirement (R. 55-56).

violation of Section 8(a)(3) and (1) of the Act, and a refusal to bargain with Progressive in violation of Section 8(a)(5). In addition, the Board found that the UMW restrained the employees in violation of Section 8(b)(1)(A) of the Act by notifying them, at a time when they were represented by Progressive, that the UMW contract would be applied at the Millstadt and O'Fallon mines, and by executing and maintaining such contract there. Finally, the Board found that, through the closed shop provisions of the contract, the UMW caused discrimination in violation of Section 8(b)(2) (R. 35–44, 54–57).

The Board's order required the Company and the Union to cease and desist from the unfair labor practices found (R. 57–61). It also required the Company to bargain collectively with Progressive upon request, to withdraw and withhold recognition from UMW at the Millstadt and O'Fallon mines unless and until the UMW had demonstrated its majority status in a Board election, and to make the employees whole for any losses suffered by reason of the discriminatory lockout. Finally, the Company and the Union were required to reimburse employees for all dues and fees exacted from them under the closed shop provisions of the contract, and for any loss suffered by reason of the discriminatory discontinuance of the Progressive Welfare and Retirement Fund payments. (R. 59–62.)

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals upheld the Board's unfair labor practice findings as supported by substantial

evidence on the whole record, except the finding that the contract entered into between the Company and UMW contained an illegal closed-shop provision. As to the latter finding, the court was of the view that the savings clause in the UMW contract (n. 8, *supra*) was sufficient to suspend the effectiveness of its closed shop requirements. In the light of that conclusion, the court denied enforcement of the dues-reimbursement provisions of the Board's order. It also denied enforcement of that part of the Board's order which required payments to the Progressive Welfare Fund, and deleted[9] the "or any other employer" provision from the Board's cease and desist order against the UMW. (R. 61).[10] In all other respects, the court's opinion approved the Board's order.[9] (Company Pet. App. 1–14, 17–22.)

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[9] The court's holdings on the closed shop and dues reimbursement issues are consistent with this Court's decisions in *National Labor Relations Board* v. *News Syndicate Co.* and *Local 60, Carpenters* v. *National Labor Relations Board*, Nos. 339, and 68, this Term, April 17, 1961. The Board, moreover, has decided not to contest the court's action in denying enforcement of the part of its order requiring payments to the Progressive Welfare Fund, and in deleting the "or any other employer" clause.

[10] However, when the court subsequently entered its decree (Company Pet. App. 17–22), it deleted the provision of the Board's order requiring the Company to bargain with Progressive (R. 58–59). The Board has petitioned the court for rehearing on this modification, and the matter is still pending. Contrary to the position of the Company and the Union (Company Pet. 11–12, Union Pet. 41–42), we do not believe that the pendency of that motion warrants deferring a ruling on these petitions for certiorari. Whether or not a bargaining order is appropriate in the circumstances of this case, it is clear that the questions presented by the petitions do not warrant review by this Court.

ARGUMENT

1. The fundamental substantive issue raised by both petitions (Union Pet. 3–5; Company Pet. 3) is whether substantial evidence on the record considered as a whole supports the Board's unfair labor practice findings. The court below concluded, with modifications not at issue here, that substantial evidence did support the Board's order. The resolution of that factual issue adversely to petitioners does not, in the circumstances of this case, present a question warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the evidence detailed in the Statement demonstrates that there is ample support in the record for the Board's unfair labor practice findings. Thus, in May or June 1957, the UMW representative advised the Company that it desired the UMW agreement, applicable at the Company's other mines, extended to the Millstadt and O'Fallon mines, then represented by, and under contract, with Progressive. The Company gave UMW a list of the employees' names and addresses, and UMW sent each employee a letter, which was also published in the newspaper, declaring that the UMW contract was applicable to them and requesting that they become members of the UMW. When Progressive complained, the Company refused to discuss the matter. Moreover, the mines, which in the meantime had been closed for the annual vacation, were kept down beyond their scheduled reopening date while management officials told employees that operations would not be resumed unless

they switched their alliance to UMW. The Company underscored these threats by withdrawing from the Association which bargained with Progressive, notifying Progressive that it was terminating the contract, and refusing to honor Progressive's bargaining demand. As a result, the employees defected to the UMW, whereupon the Company discontinued payments into Progressive's Welfare Fund and began to apply the UMW contract to the Millstadt and O'Fallon mines.

In these circumstances, the Board was fully justified, as the court below found, in concluding that the Company's actions were designed to induce the employees to change from Progressive to UMW; that accordingly the Company contributed unlawful assistance to the UMW, and the UMW, by furthering the Company's actions and accepting the fruits thereof, restrained and coerced the employees in their free choice of a bargaining representative; and, finally, that UMW's subsequent majority was not freely acquired but tainted by the unfair labor practices.

Petitioners' contention (Company Pet. 8–11; Union Pet. 34) that the Board could not properly find that the furnishing of mailing lists to the UMW constituted illegal assistance overlooks the fact that such action was found unlawful only in the context of the entire course of conduct (see n. 7, *supra*). Even if furnishing a mailing list does not *per se* amount to an unfair labor practice, this action may properly be viewed as having more significance where, as here, it is part of a program to displace one union with another. Similarly, although the Union's letter to the

employees (p. 5, *supra*), standing alone, might not be regarded as exerting a coercive impact on them (Union Pet. 39–40), the contrary conclusion is warranted when the letter is viewed in the context of the total pattern of events. Nor are petitioners aided by emphasizing that the court below found that there was no evidence that any employee was actually coerced into paying dues to UMW, that membership in UMW was not a condition of employment, and that no employee lost his job in the changeover to UMW (Union Pet. 35–36; Company Pet. 8). Conduct may be sufficient to sustain a finding that employees were coerced or illegally encouraged in their choice of a representative even though it may not be sufficient to establish the further fact that the employees joined the "assisted" union, or paid dues to it, unwillingly. See *Local 60, Carpenters* v. *National Labor Relations Board*, No. 68, this Term, decided April 17, 1961, where the Court found that, although the employees were subjected to an illegal hiring arrangement, it did not follow that they were coerced to pay dues and fees to the union.

2. There is no substance to the Company's attack (Company Pet. 6–8) upon the provisions of the Board's order, enforced by the court below, which require the Company to cease and desist from "in any other manner interfering with, restraining or coercing employees in the exercise" of their rights under the Act (Company Pet. App. 19), and to cease and desist from "encouraging membership in [UMW] or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employ-

ment or any term or condition of employment" (*ibid.*). In view of the Board's findings that the Company had committed numerous acts in violation of Section 8(a) (1), (2), (3), and (5), demonstrating a course of conduct on the part of the Company designed to impair the employees' rights to join and bargain through representatives of their own choosing, and to encourage their membership in UMW, the appropriateness of the above prohibitions cannot be doubted. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385; *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426.[11]

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[11] It may be noted that the court did modify the breadth of the order in one respect (p. 11, *supra*).

Insofar as the Company attempts to suggest that there is no basis for prohibiting "discrimination in regard to hire or tenure of employment" (Company Pet. 3, 7–8), it overlooks the Board findings, enforced by the court below, of extensive violations of Section 8(a) (3) and (1) of the Act, which included the discriminatory lockout of employees, the discontinuance of welfare payments, and the execution of a contract with an unlawfully assisted union (pp. 9–10, *supra*).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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